STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGEL LUIS PEREZ, SR.,

Defendant-Appellant.

UNPUBLISHED
February 18, 2000

No. 214190
Branch Circuit Court
LC No. 98-016513-FC

Before: Markey, P.J., and Murphy and R.B. Burns*

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of second degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). The trial court sentenced defendant to four concurrent terms of one hundred seventeen to one hundred eighty months' imprisonment. Defendant appeals as of right. We reverse and remand for a new trial.

Of the several issues raised on appeal, we find one sufficiently meritorious to require reversal. Defendant claims that clear error was committed because the verdict form did not give the jury the opportunity to find defendant either generally not guilty or specifically not guilty of the lesser included offense of second-degree criminal sexual conduct. We agree.

Defendant did not object to the verdict forms. Therefore, the issue is not properly preserved for appeal. In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show: (1) that an error occurred; (2) "that the error was plain, i.e., clear or obvious"; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Thus, "a plain unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." *Grant*, *supra* 445 Mich at 553. This test applies to unpreserved allegations of both constitutional and nonconstitutional error. *Carines*, *supra*, 460 Mich at 764. Once an appellant has satisfied these three requirements, an

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted only when the plain, unpreserved error resulted in "the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764.

The verdict form gave the jury the following options for each of the four counts: (1) "We, the jury, find the Defendant not guilty of criminal sexual conduct - 1st degree;" (2) "We, the jury, find the Defendant guilty of criminal sexual conduct - 1st degree;" (3) "We, the jury, find the Defendant guilty of the lesser included offense of criminal sexual conduct - second degree." The jury was not given the opportunity to find defendant either not guilty of the lesser included offense or generally "not guilty."

In *People v Clark,* 295 Mich 704, 707; 295 NW 370 (1940), our Supreme Court stated that "[o]ne of the substantial elements of a constitutional right to trial by jury is the right of the jury, in criminal cases, to give a general verdict on the merits." Defendant relies on *People v Mikulin,* 84 Mich App 705, 709; 270 NW2d 500 (1978), overruled on other grounds, *People v Grant*, 445 Mich 535, 544; 520 NW2d 123 (1994), where the Court noted that the jury must be given the opportunity to return a general verdict of not guilty. In *Mikulin*, the Court was addressing the issue of what constitutes proper jury instruction when a defendant argues the affirmative defense of insanity. *Id.* at 708. We held that it was error necessitating reversal for a court to include only the possibility of a verdict of not guilty by reason of insanity, and not the possibility of a general verdict of not guilty. *Id.* at 709, citing to *People v Marvin White,* 81 Mich App 335, 339, n 1; 265 NW2d 139 (1978), where the Court noted that, when the defendant raises the affirmative defense of "not guilty by reason of insanity," the jury must be given the opportunity to return a general verdict of "not guilty." See also, *People v Woody*, 380 Mich 332, 337-338; 157 NW2d 201 (1968).

In *People v Garcia,* 448 Mich 442; 531 NW2d 683 (1995), the defendant had been charged with first-degree felony murder. *Id.* at 445. He did not raise the insanity defense. The jury convicted the defendant of the lesser included offense of second-degree murder. *Id.* In an unpublished per curiam opinion, we reversed the defendant's conviction for second-degree murder because the verdict form did not give the jury the opportunity to find the defendant not guilty of the lesser included offenses of second-degree murder and armed robbery. *People v Garcia*, unpublished opinion per curiam of the Court of Appeals, decided October 19, 1988 (Docket No. 94233); *Garcia, supra,* 448 Mich at 445-446.

Garcia is factually similar to this case. Here, as in *Garcia*, the verdict form did not give the jury the opportunity to return a general verdict of "not guilty." However, *Garcia* came before our Supreme Court on a double jeopardy issue. *Id.* at 448. Whether this Court correctly reversed the defendant's conviction because of the verdict form was never directly addressed. Therefore, the decision regarding the verdict form in *Garcia* is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1); *People v Reid,* 233 Mich App 457, 474; 592 NW2d 767 (1999). Nevertheless, this Court's *Garcia* opinion, coupled with the earlier cases addressing the requirements of a general not guilty option when the defendant asserts an insanity defense, supports our conclusion that it was plain error for the trial court not to allow the jury to return a general verdict of not guilty for each count listed on the verdict form. See *Taylor v Lenawee Rd Comm'rs*, 216 Mich App 435, 439, n1; 549 NW2d

80 (1996). This error seriously affected the fairness and integrity of the judicial proceedings. *Grant, supra* 445 Mich at 763-764.

Because the trial court instructed the jury on first-degree criminal sexual conduct and the lesser included offense of second-degree criminal sexual conduct, it was plain error for the verdict form not to give the jury the option of finding defendant either generally not guilty, or not guilty of the lesser included offense of second-degree criminal sexual conduct.[1] Accordingly, because this error affected defendant's constitutional right of trial by jury, US Const, Am VI; Const 1963, art 1, § 14, reversal is warranted. *Carines, supra,* 460 Mich at 764; *People v Rodgers*, 119 Mich App 767, 771; 327 NW2d 353 (1982).

Our disposition of this issue makes it unnecessary to address the remaining claims of error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns

[1] The standard verdict form of CJI2d 3.36 would have been appropriate.